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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,
Petitioner,

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 486 F.2d 863. The Decision and Order of the National Labor Relations Board, which was reviewed by the Court of Appeals, is reported at 197 NLRB No. 127. The Decision and Determination of Dispute of the National Labor Relations Board, which is the Board's determination of a union jurisdictonal dspute, is reported at 191 NLRB 828.

JURISDICTION

The judgagment of the Court of Appeals was entered on Septembeover 20, 1973 (A. 72). Thereafter, a rehearing was sosought which was denied by the Court of Appeals on N November 26, 1973 (A. 73). This Court's jurisdiction is is invoked under 28 U.S.C. § 1254(1), the Petition for a Writ of Certiorari having been filed within ninety (90) days after the Court of Appeals' denial of rehearing.

STATUTES AND REGULATIONS INVOLVED

The following sections of the Labor Management Relations Act (L.M.R.A.), 29 U.S.C. § 151 *et seq.* are applicable to this case and are appended verbatim to the Petition: § 8(b)(4)(D), § 10(f) and § 10(k). The following pertinent sections of the L.M.R.A. are appended verbatim to the Brief: § 10(b), § 10(j) and § 10(l). The following sections of the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 500 *et seq.* are applicable and are appended verbatim to the Petition: § 551(6), § 551(7), § 554, § 556 and § 557. Section 101.34 of the National Labor Relations Board's Statements of Procedure, 29 C.F.R. § 101.34 is applicable to this case and is appended verbatim to the Petition.

QUESTIONS PRESENTED

1. Whether a jurisdictional dispute proceeding under § 10(k) of the Labor Management Relations Act must be conducted in accordance with the provisions of the Administrative Procedure Act applicable to adjudications.

2. Whether the subsequent prosecution of the unfair labor practice case by the same N.L.R.B. attorney who presided at the prior § 10(k) hearing violated the Administrative Procedure Act's proscription of commingling prosecutorial and decisional functions.

STATEMENT OF THE CASE

Upon a charge filed by ITT-CESD on December 3, 1970, a hearing was held in March, 1971, before a duly designated hearing officer of the National Labor Relations Board (hereinafter designated as "Board"). This hearing was conducted under § 10(k) of the Labor Management Relations Act, 29 U.S.C. § 160(k), for the purpose of receiving facts concerning competing work jurisdiction claims by Local 134, International Brotherhood of Electrical Workers (hereinafter designated as "Local 134") and the Communications Workers of America (hereinafter designated as "CWA").

The hearing officer was not an administrative law judge (formerly designated as trial examiner) and the hearing was conducted in accordance with the Board's long-standing Statements of Procedure for the handling of such cases, 29 C.F.R. § 101.34, providing for a hearing, "non-adversary in character" for which "the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board." As is further provided in the Board's Statements of Procedure, at the close of the hearing, the case was transmitted to the Board for decision with an analysis prepared by the hearing officer but without any recommendation by him in regard to the resolution of the dispute.

Local 134 raised no objection at the hearing, nor in its brief to the Board, to the conduct of the hearing by a hearing officer, as opposed to an administrative law judge; to its inability to submit recommended findings to the hearing officer; or to the failure of the hearing officer to render a recommended decision. In short, no procedural objections premised upon the provisions of the A.P.A. applicable to "adjudications" were raised by Local 134 at any stage of the § 10(k) proceeding.

The Board issued its Decision and Determination of Dispute on June 30, 1971, wherein it awarded the disputed work to employees of ITT-CESD represented by the CWA, rather than to employees of other employers, represented by Local 134 (A. 9).

Following the refusal of Local 134 to comply with the Board's jurisdictional award, a complaint against Local 134 issued, alleging a violation of § 8(b)(4)(D) of the L.M.R.A., and a § 10(b) hearing was held thereon before an Administrative Law Judge, in accordance with the Board's Statements of Procedure, 29 C.F.R. § 101.36. At this adversarial hearing, the attorney who prosecuted the case on behalf of the Board's General Counsel, was the same individual who had previously presided at the § 10(k) hearing as the hearing officer. However, Local 134 raised no objection during the hearing before the Administrative Law Judge to this Board attorney's prosecution of the § 8(b)(4)(D) unfair labor practice. The first objection raised by Local 134 concerning a violation of the A.P.A. was presented in its brief to the Administrative Law Judge and complained for the first time that the same attorney who had presided at the § 10(k) hearing should not have prosecuted the unfair labor practice case.

Neither the Administrative Law Judge nor the Board, commented upon Local 134's belated objection premised on the A.P.A. The Administrative Law Judge's decision and recommended order was issued on February 7, 1972, finding that Local 134 had violated § 8(b)(4)(D) (A. 34). On June 22, 1972, the Board issued its Decision and Order affirming the findings of the Administrative Law Judge (A. 51).

Thereafter, Local 134 petitioned the Court of Appeals for the Seventh Circuit to review and set aside the

Board's Decision and Order, and the Board cross-petitioned for enforcement pursuant to 29 U.S.C. § 160(e) (A. 56, 60).

On September 20, 1973, the Court of Appeals issued its Order denying enforcement of the Board's Decision and Order. The Court of Appeals did not disturb the Board's jurisdictional award but rather found that:

> "Testimony at the § 10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similarly to that involved here in Cook County and the Board determined that by area, employer, and industry practice, and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134." (486 F.2d at 865). (A. 66).

The Court of Appeals also did not disturb the Board's findings and conclusions in the subsequent unfair labor practice proceedings. Specifically, the Court of Appeals held that:

> "[ITT-CESD] was coerced by Local 134 in an attempt to have the work assigned to employees the Local represents. In these circumstances the employer was 'trapped' in a jurisdictional dispute between the two contesting unions. . . . Such is the very activity § 8(b)(4)(D) was intended to prohibit." (486 F.2d at 866). (A. 67-68).

The basis for the Court of Appeals' denial of enforcement of the Board's Order, was that the individual who acted as the hearing officer in the § 10(k) proceeding was not an administrative law judge pursuant to 5 U.S.C. § 556 and also that the same person later acted as the prosecutor of the unfair labor practice complaint. On these facts, the Court of Appeals concluded that there had been a commingling of prosecutorial and decisional functions in violation of § 554 of the A.P.A.

SUMMARY OF ARGUMENT

The Seventh Circuit has held that "both the spirit and the letter" of § 554 of the A.P.A. require that § 10(k) proceedings under the L.M.R.A. be conducted in accordance with the A.P.A. provisions applicable to "adjudications". According to its decision, a § 10(k) hearing must be conducted by an administrative law judge as required by § 556; and the administrative law judge must render a recommended decision as required by § 554(d) and § 557. The recommended decision of the administrative law judge, determining a jurisdictional dispute, would then, according to the Seventh Circuit, be reviewable by the Board and, without an unfair labor practice proceeding, become a final agency order subject to judicial review.

In so holding, the Seventh Circuit has failed to recognize the Congressional intent underlying enactment of the A.P.A. as well as the reasons for enactment of § 10 (k) of the L.M.R.A. Analysis of § 554, as well as its legislative history clearly shows it is applicable only to accusatory proceedings involving a prosecutorial function. In enacting the A.P.A., Congress was primarily concerned that in proceedings involving "adjudications" and leading to a final agency order, that the prosecutorial and decisional functions would be handled by different persons completely independent of one another. Congress also felt strongly that hearing examiners should render the initial decision in these accusatory proceedings, and that their decisions be rendered completely free of supervision by any person directly under the authority of the agency which would finally pass on their initial decisions.

The Congressional intent reflected in the A.P.A. is that the scheme for these accusatory proceedings is that the hearing, or trial, would lead directly to the examiner's initial, independent decision, followed by review

of that decision by the agency without further evidentiary hearings, and that the order then issued would be judicially reviewable.

When the legislative history of the L.M.R.A. is viewed against the backdrop of the A.P.A.'s legislative history, it becomes clear that Congress did not intend § 10(k) proceedings to be adjudications within the A.P.A.'s meaning. The L.M.R.A.'s legislative history reflects that the passage of § 10(k) and related sections 8(b)(4)(D), 10(j) and 10(l), were intended to be an interlocking statutory scheme designed to quickly end jurisdictional strikes. It was Congress' objective to protect the public and employers from the economic havoc caused by the prolongation of such strikes. Section 10(k) as well as sections 10(j) and 10(l) were merely intended to be additional procedures, ancillary to an accusatory proceeding under § 8(b)(4)(D), in order to achieve this objective. This is supported by a significant omission from § 10(k) of provisions of the Senate's original version of that section which provided for the Board's appointment of arbitrators to hear jurisdiction disputes, and which made awards of such arbitrators final and judicially reviewable. These provisions in the Senate version were dropped in conference with the House. From their omission it can be inferred that the Senate was persuaded that final and judicially reviewable § 10(k) determinations, in light of § 10(j) and § 10(l), were unnecessary to achieve the Congressional purpose of quickly resolving the cause of jurisdictional strikes. It was hoped that the § 10(k) procedure would resolve the dispute precisely because such a resolution would avoid the time consuming processes of a Board hearing and adjudication, followed by judicial enforcement.

A consideration of both the legislative history of the A.P.A. and the L.M.R.A. leads to the conclusion that Congress did not intend § 10(k) proceedings to be ad-

judications within the meaning of § 554. This Court's decision in *N.L.R.B.* v. *Plasterers' Union No. 79*, 404 U.S. 116 (1971) clearly acknowledged that a § 10(k) decision is not binding on any party)even the striking union), and that the award is not an order. We ask the Court in the case at bar to logically extend its *Plasterers'* decision and hold that such a non-binding decision which does not constitute an order is, therefore, not an "adjudication" within the intendment of the A.P.A.

The Congressional purposes for the enactment of the A.P.A. and the L.M.R.A. one year later must be accommodated so as to preserve to each the essential goals for which they were enacted. The only reasonable basis for such an accommodation is to construe § 10(k) determinations as essentially the same kind of proceedings as § 9 representation proceedings, which are expressly exempted from the class of adjudications under § 554. Such a construction does not unduly strain the "certification of worker representatives" exemption in § 554(a)(6). A determination of dispute and Board award of work under § 10(k) is, in effect, a certification of which worker representative's members should perform disputed work. The only distinguishable feature between resolutions of worker certification under § 9 and resolutions of work disputes under § 10(k) is that the latter proceeding is triggered by a strike or a threat of a strike by one of the competing unions. Both types of proceedings are non-accusatory, do not involve a prosecution for any statutory violation, and neither result in a binding order. In both, the facts gathered are generally undisputed and relate to the kind of work performed by designated groups or classes of employees, bargaining history, the organizational structure of the employer's business, and other economic facts from which the Board determines the appropriate unit for bargaining or the appropriate union or group to which work should be assigned. Both § 9(c)

and § 10(k) hearings are held to elicit the same kind of evidence; neither results in an order of the Board; and neither, therefore, should be conducted as an adjudication.

Rather than accommodate the purposes of both statutes, the Seventh Circuit's decision has created an irreconcilable conflict between the two (2) and has also totally emasculated the essential purpose for § 10(k)'s enactment. The net result of the decision below is that a jurisdictional award is a final order of the Board as that term is used in the A.P.A., notwithstanding that Congress has provided that it is not an order under the L.M.R.A. If it is an order under the A.P.A., it is subject to judicial review; however, if it is not an order under the L.M.R.A., it is not subject to judicial review. If it is subject to judicial review, a court of appeals would render a pronouncement on the propriety of the Board's determination of which union is to perform the work but any non-compliance would only result in the prosecution of an unfair labor practice complaint, producing another adjudication, another order, and possibly another review in the court of appeals. Such an extraordinary and time-consuming process is an absurdity which this Court, under its established principles of statutory interpretation, should not allow to prevail.

The Seventh Circuit's decision overturns the Board's consistent procedure for the resolution of jurisdictional disputes and its interpretation that § 10(k) determinations are not adjudications. This procedure, embodying the Board's interpretation, was established contemporaneously with the passage of § 10(k) in 1947 and was unchallenged in court until the case at bar and *Bricklayers, Masons and Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973). The Board's interpretation of its statutory mandate under § 10(k) is entitled to great weight.

The factual basis which caused the Seventh Circuit to deny enforcement of the Board's order in this case was the prosecution of the unfair labor practice complaint against Local 134 by the same Board attorney who had conducted the prior § 10(k) hearing. Even if a § 10(k) hearing is not literally an adjudication within the meaning of § 554 of the A.P.A., the Court of Appeals has held that the spirit of subsection 554(d) was violated by a commingling of prosecutorial and decisional functions. In so holding, however, the Seventh Circuit has misconceived the nature of the § 10(k) hearing and the hearing officer's role. The hearing officer does not share any decisional authority with the Board in a jurisdictional dispute determination. He makes no recommended decision. Even if conducting the hearing is construed to be decisional, the prosecution does not occur until after the § 10(k) determination, and the hearing officer could not foresee that he would subsequently prosecute the case because the Board normally assigns a different attorney to prosecute. The most serious misconception of the Court of Appeals is its impression that the hearing officer is engaged in the preparation of the prosecution while he presides at the § 10(k) hearing. The Court of Appeals likened the hearing officer's role to that which was denounced by the Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), as improper commingling of functions by a presiding inspector in deportation proceedings. A § 10(k) hearing, however, is completely dissimilar to a deportation hearing, the latter being an accusatorial proceeding wherein the presiding inspector has the duty of making the case as strong as is necessary to support the charges against the alien. In a § 10(k) hearing, the hearing officer does not have a duty, nor is he even allowed, to fashion a case for or against one union over the other.

There is no claim of any prejudice or impropriety which Local 134 suffered by reason of any of the violations of the A.P.A. found by the Seventh Circuit. In fact, Local 134 never raised an objection to the same attorney prosecuting the complaint until it filed its brief with the Administrative Law Judge, long after the hearing had ended and the record in the case was closed.

ARGUMENT

The Court Of Appeals Decision Requires That Jurisdictional Dispute Hearings Under § 10(k) Be Conducted By Administrative Law Judges And Makes Determination Of Such Disputes By The Board A Final Appealable Order Subject To Judicial Review.

The issue in this case is essentially the same as that presented to the Court of Appeals for the District of Columbia in *Bricklayers, Masons & Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973). There the Board determination of dispute under § 10(k) was claimed by the Bricklayers Union to be improper because it had been made without a recommended decision of a trial examiner. The Union contended that a recommended decision was required "in every case of adjudication required by statute to be determined on the record after an opportunity for an agency hearing. . ." (5 U.S.C. § 554(a)). The court held that a § 10(k) determination is not an adjudication within the meaning of § 554 and Judge Fahy, speaking for the court, framed the issue by saying:

> ". . . only if a section 10(k) determination is an adjudication within the meaning of section 554 would a recommended decision have been required." (*Id.* at 1318)

The Seventh Circuit, contrary to the holding of the District of Columbia Circuit in the *Bricklayers* case, held that a § 10(k) determination is an "adjudication" within the meaning of that term as used in § 554 of the Administrative Procedure Act. It based its decision on

the fact that because the hearing officer in the § 10(k) proceeding subsequently prosecuted the unfair labor practice complaint in a § 10(b) hearing, there occurred a violation of "both the spirit and the letter" of § 554(d) of the Administrative Procedure Act (A. 71). This section of the A.P.A., among other things, bars the commingling of adjudicatory and prosecutorial functions. In holding this section applicable to § 10(k) proceedings under the L.M.R.A. the Court of Appeals concluded that such proceedings constitute an "adjudication" as that term is used in subsection 554(a) of the A.P.A.

Section 554 of the A.P.A. is applicable, as it states, only to a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." Except for those matters excluded by subsections 554(a)(1)-(6), such adjudications are required by other provisions of § 554, § 556 and § 557 to be conducted in accordance with stated procedural safeguards. Subsection 554(d) relates to the separation of decisional and prosecutorial functions and mandates that the agency employee presiding at the reception of evidence "shall make the recommended decision or initial decision" and refers to § 556 which requires that such person be a hearing examiner appointed under § 3105. Subsection 556(c) also prescribes the duties and responsibilities of such examiners and § 556(d) sets out the rights of the parties in the presentation of their cases before hearing examiners. Subsection 554(d) also refers to § 557 which requires examiners to make initial decisions (unless the matter is certified to the agency) and provides for appeals to the agency from examiners' initial decisions leading to a final agency order.

The statutory scheme of the A.P.A. is that a § 554 proceeding is *quasi judicial* in nature since it is an adjudication leading to final agency action. Moreover, the initial hearing contemplated by this section is the

initiation of a proceeding which, without further evidentiary proceedings, leads to final agency action and an appealable order subject to judicial review. Thus, it is clear that the Court of Appeals' holding that § 10(k) proceedings are adjudications within the meaning of § 554 of the A.P.A., if allowed to stand by this Court, leads to a twofold result. First, all § 10(k) determinations must henceforth be conducted by hearing examiners, now known as administrative law judges. Second, the determination of jurisdictional disputes by the Board will result in what the Court of Appeals deems to be final agency orders, directly appealable to courts of appeals, without the Board having made a decision on the merits of an alleged unfair labor practice under § 8(b)(4)(D).

It is submitted that the decision of the Court of Appeals is erroneous since it is contrary to the legislative intent of the Administrative Procedure Act as well as the Labor Management Relations Act. Support for this position is found not only in decisions of this Court in *N.L.R.B.* v. *Plasterers' Union No. 79*, 404 U.S. 116 (1971) and the District of Columbia Circuit in *Bricklayers, Masons & Plasterers International Union of America* v. *N.L.R.B.*, 475 F.2d 1316 (C.A.D.C., 1973), but also in the legislative histories of both statutes.

Legislative History Of The A.P.A. Shows That Adjudicative eHarings Under § 554 Are Limited To Accusatory Proceedings Involving A Prosecution.

The question of statutory interpretation before the Court is whether a § 10(k) determination is such an "adjudication required by statute [L.M.R.A.] to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—. . . (6) the certification of worker representatives" (§ 554(a)(6)). A literal reading of § 10(k) does not provide a conclusive answer for it simply states in relevant part that:

"[T]he Board is empowered and directed to hear and determine the dispute . . ."

Standing alone it is unclear from this quoted portion of § 10(k) whether Congress has directed a determination of the jurisdictional dispute on the record after opportunity for agency hearing.[1] A proper resolution of the question will, therefore, require resort to the legislative intent of both the A.P.A. and L.M.R.A., as determined by the congressional purpose for the enactment of both statutes as a whole and the legislative intent regarding particular provisions of those statutes.

The Administrative Procedure Act was drafted for the specific purpose of classifying the activities of administrative agencies, providing basic procedures for the conduct of those activities, and establishing provisions for judicial review of agency orders. The legislation was purposefuly drafted on a functional approach, not specifying any particular agency or naming any specialized agency process. The Report of the House Committee on the Judiciary contains the following explanation:

> "Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See sec. 2(a)). Where an agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted." (Senate Judiciary Comm., The A.P.A. LEGISLATIVE HISTORY, H.R.Rep. No. 1980, 79th Cong., 2nd Sess., at 250, (1946) (hereinafter cited as The A.P.A. LEGISLATIVE HISTORY)).

[1] *Compare, United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973) and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), wherein this Court decided that § 556 and §557 of the A.P.A. were not applicable to a certain class of Interstate Commerce Commission rule-makings even though the Interstate Commerce Act provided for such rule-making "after hearing". The Court reasoned that because the language did not specifically contain the phrase "on the record after opportunity for agency hearing", that Congress had not intended § 556 and § 557 to apply.

Senator McCarran, the Chairman of the Senate Judiciary Committee, reported the bill (S. 7) out of his committee to the Senate and stated the general purpose and intent of the legislation as follows:

> "I cannot emphasize too strongly that the bill now before the Senate is not a specification of the details of administrative procedure. Neither is it a codification of administrative law. It represents, instead, an outline of minimum basic essentials, framed out of long consideration and in the light of the comprehensive studies I have previously mentioned.
>
> To state it simply, this bill is designed to afford parties affected by administrative powers a means of knowing what their rights are, and how they may be protected. At the same time, administrators are provided with a simple course to follow in making administrative determinations. The jurisdiction of the courts is clearly stated. The bill thus provides for public information, administrative operation, and judicial review." (93 Cong. Rec. 2151) (1946).

The statute reflects an effort to classify all agency action into two (2) types—legislative (or rule-making) and adjudicative—even though some particular agency actions were not amenable for classification into either category. Consequently, functional exemptions, such as the exclusion of "the certification of worker representatives" were carved out of the class of "adjudications" (§ 554(a)(6)).

Section 551(7) defines adjudication as "agency process for the formulation of an order." Order is defined as

"the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making, but including licensing;" (§ 551(6)). Construing these two definitions together, an adjudication is literally any agency process for the formulation of a final disposition of a matter other than rule-making. These conclusionary definitions, however, do not, standing by themselves, adequately describe the kinds of proceedings which Congress set out to define as adjudications, for as the Senate Judiciary Committee Report stated:

> "The definitions in Section 2 are important, but they do not indicate the scope of the bill since the subsequent provisions make many functional distinctions and exceptions." (The A.P.A. LEGISLATIVE HISTORY, at 194).

Further statements from the legislative history disclose that the term adjudication was intended by Congress to encompass only accusatory proceedings against a person charged with violating a statutory proscription. Carl McFarland, a member of the Attorney General's Committee which initially drafted and proposed legislation leading to the Administrative Procedure Act, made this very clear in his testimony before the Senate Judiciary Committee. In reference to § 554 he said:

> "Now, to repeat, there are two kinds of administrative operations, the legislative operation called rule making which we have discussed, and *adjudication which is sometimes called an accusatory procedure.* That is a procedure where an agency comes forward and points its finger to a given person or to a company and says, 'You have sinned and we will proceed to try you'." (The A.P.A. LEGISLATIVE HISTORY, at 78) (emphasis added).

The Senate Judiciary Committee accepted McFarland's view that the term "adjudication" as used in § 554(a)

relates only to an accusatory proceeding. A Senate Judiciary Committee print contained the following statement concerning the reason for including subsection (d) in § 554:

> " 'The first sentence of subsection (c)[2] is designed to assure, in so-called 'accusatory' proceedings, that those who hear the case shall participate in its decision'." (*Id.* at 24).

In the same print the Senate Committee further indicated that § 554 contemplated accusatory proceedings because it would include a prosecutorial function, completely divorced from the adjudicative function. Thus, the Senate Judiciary Committee's print includes the following explanation of its reasons for subsection 554(d):

> " 'The remainder of the subsection, [referring to everything following the first sentence] in such cases, is designed to achieve an 'internal' segregation of deciding and prosecuting functions. The minority of the Attorney General's Committee took the position that there should be a complete separation of functions—that is, that hearings should be held and decisions made by an administrative tribunal separate from the agency engaged in investigations and prosecutions, or by a court. (Final Report, pp 203-209). The majority however, took the position that, while 'a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions' and the 'commingling of functions of investigation or advocacy with the function of deciding are . . . plainly undesirable,' the situation could and should be remedied by appropriate internal division of labor.' " (*Id.* at 24-25).

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[2] This subsection in the Bill became subsection (d) of Section 554 as finally passed.

Later in its report the Senate Committee reiterated its intention that § 554(d) is not only intended to separate prosecutorial and adjudicative functions, but also contemplates a prosecutor in adjudicative hearings covered by § 554(a). The Report states:

> "The gist of the subsection [554(d)] is that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings and even then in no different fashion then the private parties or their representatives." (*Id.* at 203).

The legislative history of the A.P.A. on the House side also manifests an intent that § 554 involved an accusatory proceeding wherein someone is prosecuted for a statutory violation, and that such prosecution is intended to be separate from the decisional function. During House debates, Congressman Gwynne, a member of the House Judiciary Subcommittee, commenting on S. 7 and referring to subsection 554(d) said:

> "An important feature of the bill in this connection has to do with the appointment of examiners and there is a provision to keep the deciding functions separate and distinct from the prosecution part of it. Great complaint has been made that agencies send out people to prosecute the individual and, from the same office and subject to the same direction, they send out the hearing examiner who is to hear the case. This provides for separation of these functions and prohibits one from meddling with the other." (93 Cong. Rec. 5656) (1946).

In the same debate Congressman Robison made the following comment, consistent with that of his colleague:

> "This bill recognizes the principles on which our three branches of government are based so that the prosecutor may not get up the evidence, prosecute the case, and, at the same time, decide the case." (93 Cong. Rec. 5660) (1946).

It is clear from the foregoing excerpts from Congress' deliberations on the A.P.A. in 1946, that the term adjudication was intended to apply only to accusatory proceedings involving a prosecution. The pivotal point of this case is, of course, the nature of the proceedings governed by § 554. An examination below of the legislative history of § 10(k) and related provisions passed in 1947, as amendments to the National Labor Relations Act, discloses that Congress did not intend § 10(k) proceedings to be adjudications within the meaning of § 554. That history reveals, rather, that Congress deemed § 10(k) proceedings to be preliminary, investigative, non-accusatory proceedings without the presence of a prosecuting officer.[3]

The Congressional Purpose For Enacting § 10(k) Was To Avoid A § 554 Accusatory Proceeding.

Section 10(k) empowers and directs the Board "to hear and determine" jurisdictional disputes, "unless, within ten days after notice that such charge has been

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[3] Section 101.33 of the Board's Statements of Proceedure (29 CFR § 101.33) indicates that the only parties to a 10(k) proceeding are "parties to the dispute out of which the unfair labor practice is said to have arisen." No provision is made in § 10(k) for the Board's prosecutor, its General Counsel, to appear in 10(k) hearings. Moreover, the Board has recognized its General Counsel plays no role in 10(k) proceedings for in § 102.90 (29 CFR 102.90) and §§ 102.64 through 102.68 (29 CFR §§ 102.64-102.68) of its Rules and Regulations he is not mentioned. Furthermore, this Court, in *N.L.R.B.* v. *Plasterers' Union No. 79*, 404 U.S. 116, (1971) held that the proper parties in a 10(k) proceding include the unions vying for disputed work as well as affected employers. Conversely, § 101.10 (29 CFR § 101.10) of the Board's Statements of Procedure which references unfair labor practice hearings under § 10(b), describes the role of its prosecutor as follows: "The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint."

filed, the parties to such dispute shall submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 10(k) was added to the legislation in the Senate. No comparable provision had been included in the original House bill, H.R. 3020 (H.R. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. 57 (1947)). The Senate Committee on Labor and Public Welfare stated the reason for its inclusion was the Committee's conviction that "additional procedures," especially in jurisdictional disputes, were needed, going beyond provisions defining union unfair labor practices. The Committee stated that these additional procedures "must be made available under the National Labor Relations Act in order to adequately protect the public welfare which is inextricably involved in labor disputes." (S.Rep. No. 105 on S.1126, 80th Cong., 1st Sess. 8 (1947)).

In order to adequately protect the public from what this Court has called "the economic havoc of jurisdictional strikes," *N.L.R.B.* v. *Plasterers' Union, supra* at 128, the Senate Committee said it had included the additional procedures of § 10(k) because "[t]ime is usually of the essence in these matters" (S.Rep. No. 105, at 8). Thus it provided for what it clearly intended to be a preliminary additional procedure for resolving jurisdictional disputes, other than the unfair labor practice procedure under § 8(b)(4)(D). The reason for providing these additional means was Congress' great concern for the expeditious resolution of jurisdictional disputes, rather than leaving their resolution to more time consuming unfair labor practice proceedings. The Committee Report explained:

> "Time is usually of the essence in these matters, and consequently the relatively slow procedure of the Board hearing and order, followed many months later by an enforcement decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." (*Id.* at 8).

Not only did the Senate add § 10(k) as one of the "additional procedures" beyond the provisions defining union unfair labor practices, it also added § 10(j) and § 10(l), authorizing the Board to seek in district courts injunctive relief against jurisdictional strikes, pending its adjudication of claimed violations of § 8(b)(4)(D). The Senate Committee's Report states that these ancillary injunctive relief provisions were included due to the same consideration, namely urgency in stopping jurisdictional strikes, which led it to include § 10(k). Its comment on these additional procedures reads as follows:

> "[W]e have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices." (*Id.* at 8).

The foregoing taken from the legislative history of the 1947 amendments to the N.L.R.A. clearly shows that § 10(k) was only one of a number of "additional procedures", designed by Congress as a preliminary means, ancillary to § 10(b) unfair labor practice hearings, designed to eliminate, as expeditiously as possible, the harm to the public interest caused by jurisdictional strikes. In devising this truncated procedure Congress deliberately reserved for unfair labor practice hearings,

adjudications on the merits of alleged violations of § 8 (b) (4) (D). It is only in unfair labor practice hearings under § 10(b) that the prosecution—and hence an adjudication—takes place. In such hearings the Board's General Counsel, pursuant to § 3(d) of the Act exercises his authority "in respect of the prosecution of [unfair labor practice] complaints."

The legislative history of the enactment of § 10(k) clearly demonstrates that Congress sought to achieve a twofold purpose—that the Board would resolve which union should perform the work prior to any unfair labor practice proceeding, and that such resolution would be accomplished quickly. Congress was aware of the "regular procedure of the Board for hearing and judicial enforcement" (93 Cong. Rec. 1846) (1946) which necessitated an accusatory proceeding leading to an order of the Board, and purposefully chose that such disputes would be resolved in an ancillary, non-accusatory proceeding which did not result in an order of the Board. An adjudication must await the subsequent issuance of a complaint triggering a § 10(b) hearing wherein an allegation of a violation of 8(b) (4) (D) is urged by a prosecuting officer. It is this latter proceeding which constitutes an adjudication within the meaning of § 554.

The non-binding, preliminary hallmarks of a § 10(k) proceeding are illustrated by the language of the statute. There is a different quantum of proof required under § 10(k) and § 10(b). In the former the standard of proof is "reasonable cause to believe" a charge alleging a violation of 8(b) (4) (D) is true, and in the latter the standard of proof is that such charge must be established by a "preponderance of the testimony" (§ 10(c)). This Court recognized this significant distinction in *N.L.R.B.* v. *Plasterers' Union*, *supra*. Justice White, addressing the different burdens of proof in these two types of proceedings, observed at footnote 10 on page 122 that:

> "[T]o exercise its powers under § 10(k), the Board need only find that there is reasonable cause to believe that a § 8(b) (4) (D) violation has occurred, while in the § 8(b) (4) (D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8(b) (4) (D)."

It can be thus be inferred that Congress, by providing for a lesser quantum of proof in § 10(k) hearings than that required in a § 10(b) unfair labor practice hearing, manifested an intent that the former type hearing is merely a preliminary, ancillary proceeding which does not, without an additional evidentiary hearing of a different nature, lead to a final agency determination and order—the essential element of a § 554 adjudication according to the legislative history of the A.P.A.

Mr. Justice White, writing for the Court in *Plasterers'*, succinctly pointed out the preliminary and non-adjudicatory nature of § 10(k):

> "The § 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse 10(k) decision, the Board must prove the union guilty of a § 8(b) (4) (D) violation before a cease-and-desist order can issue. The findings and conclusions in a 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b) (4) (D) determination [citations omitted]. Both parties may put in new evidence at the § 8(b) (4) (D) stage. . ." (*Id.* at 122 n.10).

From the Court's perception of § 10(k) proceedings referenced in *Plasterers'*, it is but a short distance to the ultimate conclusion we urge herein, namely, that such a proceeding does not constitute an adjudication within the meaning of § 554. In order to reach this conclusion, resort again to the legislative history is helpful. Congress established a *quasi-judicial* administrative system, which

(1) leads from an evidentiary hearing; (2) to initial decision; (3) to final agency determination resulting in a final judicially reviewable order. Congress intended that the type of proceeding envisioned by § 554 was limited to that in which the evidence presented at *one hearing* (not in additional hearings) would result in an order imposing a sanction,[4] as in other prosecutions wherein there is an adjudication of guilt.

As noted above, this Court has recognized that a § 10(k) determination binds no one.

> "But the § 10(k) decision standing alone, binds no one. No cease and desist order against either union or employer results from such a proceeding; . . . Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision." (404 U.S. at 126-127) (footnote omitted).

It logically follows from what this Court has said, that a § 10(k) determination is not a process for the formulation of an order and thus it does not constitute an adjudication within the meaning of § 554. Reference again to the legislative history of § 10(k) is helpful.

The Senate version of § 10(k) in S. 1126 also contained an amendment offered by Senator Morse for the Board's appointment of an arbitrator to hear the merits of

[4] In *N.L.R.B.* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 576-577 (1961), this Court noted it was Congress' intent in passing § 10(k) to avoid sanctions following unfair labor practice proceedings: The Court said at pp. 576-577:

> "[W]hen Congress created this new type of unfair labor practice by enacting § 8(b)(4)(D) as part of the Taft-Hartley Act in 1947, it also added § 10(k) to the Act. Section 10(k), set out below, quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions."

jurisdictional disputes, within ten (10) days of the service of notice of the filing of a charge. In offering such an amendment, he too had expressed the view that in jurisdictional disputes time is of the essence, "and the regular procedure of the Board for hearing and judicial enforcement did not remedy the evil sought to be corrected" (93 Cong. Rec. 1846) (1946). The Senate Committee accepted the amendment of Senator Morse and also added the following as the last sentence in the original Senate version of § 10(k):

> "The award of an arbitrator shall be deemed a final order of the Board" (S.Rep.No. 105 on S.1126, supra, at 8).

The Senate Committee in referring to its acceptance of the Morse Amendment and the foregoing sentence said in its Report:

> "[W]e have provided that the Board shall be authorized to appoint arbitrators to hear and determine jurisdictional disputes concerning work tasks, if the parties fail to adjust the disputes within ten (10) days. Pursuant to this authorization, arbitration awards are to have the same force as final orders of the Board." (*Id.* at 8).

In the following excerpt from its Report, the Senate Committee further amplified the final order and appealable status of an arbitration award in jurisdictional disputes:

> "Finally, the award of the arbitrator is given the same status and force as a final order of the Board, a provision which will avoid the necessity of the Board hearing the dispute if it has designated an arbitrator for that purpose and also *will permit the Board to seek enforcement of the award without further proceedings.*" (*Id.* at 27) (emphasis added).

When S. 1126 was submitted to joint conference, however, both Senator Morse's arbitrator appointment pro-

vision as well as the final order language added by the Senate Committee, were omitted (H.R.Rep. No. 510 on H.R. 3020, supra, at 57). As this Court noted at page 129 of its opinion in *N.L.R.B.* v. *Plasterers' Union*, *supra*—this was done without explanation. However, the reasons for deletion of the provision can fairly be determined from a consideration of Congress' purpose in enacting § 8(b)(4)(D), § 10(k), § 10(j) and § 10(l).

The reasons for the Senate's retreat from including arbitration under § 10(k) and making awards final orders, while not appearing in the legislative history, are nevertheless patent from considering the overall purpose of the 1947 Amendments. Both Houses of Congress were concerned with adopting means for quickly stopping jurisdictional strikes. The Senate's original concern in inserting § 10(k) into the legislation and the reasons for it expressed in the Senate Committee Report for providing arbitration having the effect of a final order, was that it was initially believed, at least in the Senate, that a final arbitral award was necessary in order to achieve this objective without awaiting the traditional and time consuming procedures of the Board under the unfair labor practice provisions. With respect to its reasons for the inclusion of final and binding arbitration, the Senate referred to "the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals" (S.Rep. No. 105 on S. 1126, supra, at 8). However, with the passage of §§ 10(j) and (l) providing for ancillary injunctive relief from jurisdictional strikes and designed to maintain the *status quo ante* while the Board, through its unfair labor practice proceeding determines, in due course, alleged violations of 8(b)(4)(D), the Senate was obviously convinced by House conferees that interim arbitration, having the effect of a final appealable order, was superfluous. In other words, deletion of the arbitration

and final order provisions from the Act as passed, manifests a Congressional intent that § 10(k) determinations do not constitute final appealable orders contemplated by the A.P.A. The decision of the Seventh Circuit below, has in effect written into the statute the finality of § 10(k) determinations, which Congress deliberately omitted as being superfluous in view of the injunctive remedies available under § 10(l).

Section 10(k) Proceedings Are Analogous To § 9 Representation Proceedings.

At the time Congress enacted the A.P.A. in 1946, the Board engaged in two (2) non-rule making activities—the resolution of questions concerning representation under § 9 of the N.L.R.A. and the prevention of unfair labor practices under § 8. The two (2), however, are quite different in character, as is clearly demonstrable from the language and structure of the statute. This Court held in *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940), that unfair labor practice proceedings result in an "order" reviewable by courts of appeals, but that certifications in representation proceedings are not reviewable orders. In its opinion, this Court noted Congress' deep concern that representation proceedings not be delayed by judicial review of the Board's representation determinations and concluded that:

> "The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms." (*Id.* at 409).

The legislative history of § 554(a)(6) of the A.P.A., excluding "the certification of worker representatives" from that statute's requirements for "adjudications", reflects the same Congressional concern for the avoidance of delay in representation cases. The Senate Judiciary

Committee stated that the basis for the exclusion was that ". . . such things as intermediate reports, findings, and written decisions are unnecessary because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition." [5] (The A.P.A. LEGISLATIVE HISTORY, at 23).

The functional similarity between § 9 proceedings and § 10(k) proceedings is obvious. The purpose of a § 9 proceeding is to determine questions concerning representation of workers and the purpose of a § 10(k) proceeding is to determine which competing group of workers should perform the work.[6] While the ultimate question of representation under § 9 is generally resolved by an election, in many cases the Board must resolve disputed issues concerning the appropriateness of the bargaining unit. In such cases it hears evidence concerning the work performed by designated groups or classes of employees; bargaining history; the nature and organizational structure of the employer's business; the size of the employer's facility or facilities; as well as other relevant factors showing a community of interest among

[5] The Attorney General's Committee on Administrative Procedure reported that "[t]he need for intermediate reports, to the extent that they provide a method for obtaining the judgment of the trial examiner on issues of fact dependent for their resolution upon the demeanor of witnesses, is rarely present in a representation proceeding. The evidentiary material relates to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining in the plant. Issues of credibility are rarely present." (S. Doc. No. 10, 77th Cong., 1st Sess., pt. 5, at 35, n. 144 (1944)).

[6] As this Court noted in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1963), there is a ". . . blurred line that often exists between work assignment disputes and controversies over which of two or more unions is the appropriate bargaining unit." If it is a work assignment dispute, then § 10(k) is operative, assuming there has been a strike or threat of a strike. If the controversy concerns which of two unions should represent the employees performing the work, a § 9 proceeding to clarify the certification is held.

employees as to their wages, hours and terms and conditions of employment.

The Board's task in a § 10(k) determination requires the same fact gathering, analysis, and application of standards and criteria, as is necessary in a § 9 proceeding.[7] The relevant factual inquiries in a jurisdictional dispute determination concern the bargaining history of one or both unions (including collective bargaining agreement); industry and area practice; relative skills of the employees; efficiency of operation; and past practices. As in the case of § 9 unit determinations, these factual matters are generally not disputed as such and the Board's determination is based upon an examination of those facts in accordance with relevant criteria.

Neither the § 10(k) determination nor the § 9 representation proceeding result in "orders" of the Board. The reasons Congress chose to exclude § 9 cases from the A.P.A. provisions relating to adjudications are the same, in part, as the reasons for which it enacted § 10(k) one year later—i.e. (1) the desire for a relatively fast procedure for resolving questions of representation or work jurisdiction, (2) in non-accusatory proceedings, (3) with non-reviewable decisions of the Board, (4) based upon the application of pre-determined standards.[8]

[7] In *Plasterers'*, *supra*, at 135, the Court characterized a § 10(k) proceeding as "a comparative proceeding aimed at determining which union is entitled to perform certain tasks."

[8] The House Conference Report on The Taft-Hartley Act indicates that Congress construed representational and jurisdictional questions as somewhat interlocking, as follows:

> "(19) The Senate amendment also contained a new Section 10(k) which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). The conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator. If the employer's employees select as their bar-

The District of Columbia Circuit clearly recognized the functional similarities between § 9 cases and § 10 (k) proceedings and concluded that the latter were not adjudications for the same reasons as were applicable to the former (*Bricklayers, supra*, at 1319).[9] We believe the District of Columbia Circuit's analysis is correct and that it further demonstrates that Congress could not have intended that the certification of work tasks would be an adjudication if the "certification of worker representatives" was not an adjudication.

The Seventh Circuit's Decision Creates An Irreconcilable Conflict Between the L.M.R.A. And The A.P.A.

In sharp contrast to the District of Columbia Circuit's decision in *Bricklayers*, the Seventh Circuit has determined that a § 10(k) determination is an adjudication under § 554 and that the requirements of that and related sections of the A.P.A. are applicable to such proceedings. In so holding, the Seventh Circuit has completely overturned the Congressional purpose of speedily resolving jurisdictional disputes and thereby avoiding a protracted "adjudication".

Under the Seventh Circuit's decision § 10(k) determinations, which are not overly quick under the present procedure,[10] would suffer significant additional delays

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gaining agent the organization that the Board determines has jurisdiction, and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it." (H.R.Rep. 510 on H.R. 3020, supra, at 57).

[9] The Court's actual statement is ". . . because of the similarity between the nature of a section 9 representation proceeding and a proceeding under section 10(k). An intermediate report by the examiner is not required in the former for reasons applicable to the latter:"

[10] Over six (6) months transpired between the filing of the charge in the instant case and the Board's determination of the dispute.

because the case would first have to await assignment of an administrative law judge, then allow for time to submit proposed findings and conclusions, and finally file exceptions to the recommended decision of the administrative law judge (§ 557(c)).

Even more destructive of Congressional intent than the lengthening of the time internal to the Board's handling of a jurisdictional dispute, is the potential for drastic delays which may result from the superimposition of the A.P.A.'s definition of "adjudication" and "order" on the Board's § 10(k) decision after it is finally rendered. If the § 10(k) proceeding is an adjudication, then the jurisdictional award is an "order" rendered by the Board after a hearing conducted by an administrative law judge. That order must, under § 551(6), be a "final order" and therefore may be reviewed by a court of appeals under § 10(f) of the L.M.R.A. (29 U.S.C. § 160(f)).[11] This circumstance would create teh absurd situation of a jurisdictional "order" being enforced or set aside by a court of appeals, after which, if it were enforced, an entirely new adjudication of the unfair labor practice would result with another hearing before an administrative law judge, another "order" of the Board, and, if necessary, another review by a court of appeals.

The Seventh Circuit's decision creates an irreconcilable conflict between the language and intent of the statutory scheme for the resolution of jurisdictional disputes and the provisions of the A.P.A. While Congress has clearly provided that a jurisdictional award is not an order under the L.M.R.A., the Seventh Circuit has held, in

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[11] That section provides in part that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business. . .".

effect, that it is an order under the A.P.A. Under long-standing principles of statutory construction applied by this Court, the Seventh Circuit's construction of these statutes cannot be allowed to stand.

In *Sorrells* v. *United States*, 287 U.S. 435, 446 (1932), the Court stated that:

> "Literal interpretation of status at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."

In *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) the Court noted that the construction of statutes "so as to avoid results glaringly absurd, has long been a judicial function". *See, also, United States* v. *American Trucking Ass'n.*, 310 U.S. 534, 543 (1940), wherein the Court stated:

> "When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (footnotes omitted);

and *Southland Co.* v. *Bayley*, 319 U.S. 44, 47 (1943),

> "The problem of statutory construction posed by this conflict of circuits should not be solved simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carrier Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation."

The Seventh Circuit's decision has applied the literal definition of adjudication in the A.P.A. to § 10(k) proceedings, clearly producing an absurd result which is not mandated by the policy and intent of the A.P.A. and which is completely contrary to the policy and intent of the L.M.R.A.'s procedures for the expeditious resolution of jurisdictional disputes.

The Board's Long-Standing And Consistent Treatment Of § 10(k) Determinations As Non-Adjudicatory Is Entitled To Great Weight.

From the time § 10(k) was enacted in 1947, the Board has consistently conducted § 10(k) proceedings in the same manner as it has conducted § 9 proceedings—i.e., with hearing officers rather than independent trial examiners, without proposed findings, and without exceptions. As early as 1949, specific challenge to the Board's § 10(k) procedure as violative of provisions of the A.P.A. relating to adjudications was raised and the Board stated as follows:

> "The Respondents assert that Section 8 [§ 557] of the Administrative Procedure Act applies to a proceeding under Section 10(k) of the National Labor Relations Act, as amended. We do not agree. Under Section 202.32 of the Board's Rules and Regulations —Series 5, as amended, the hearing under Section 10(k) is non-adversary in character, and, according to the procedure adopted therefor, conducted in the same way as a hearing in a representative proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies."

(*Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341, 341 (1949)).

To the same effect is the Board's holding in *International Longshoremen's & Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626 (1959).

The Board's interpretation that the statutory scheme for the resolution of jurisdictional disputes is not adjudicative until unfair labor practice liability is litigated, was rendered contemporaneously with the enactment of § 10(k) and should be given great weight by this Court as a guide to statutory interpretation. In *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315 (1933), Mr. Justice Cardozo said:

> "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U.S. 760, 763; *Logan* v. *Davis*, 233 U.S. 613, 627; *Brewster* v. *Gage*, 280 U.S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375; *Interstate Commerce Comm.* v. *New York, N.H. & H.R. Co.*, 287 U.S. 178, ante, 248. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

For more recent applications of this interpretive principle, see *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965), where the Court stated: "The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute"; and *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), stating: "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

Not only has the Board consistently treated § 10(k) proceedings as non-adjudicatory since that provision became law in 1947, but also the Board's interpretation has impliedly been accepted by courts of appeals and even this Court in past decisions construing the meaning and purpose of § 10(k), although no court has specifically passed upon this question until the District of Columbia and Seventh Circuits' 1973 decisions. The District of Columbia Circuit specifically noted in this regard that:

> "[W]e are faced with an unusually impressive administrative interpretation supporting the conclusion we reach, first adopted by the Board as long ago as 1949. . . . and until now, we believe, not questioned by courts or Congress. This interpretation of section 10(k) by the Board is entitled to great weight." (*Bricklayers, supra*, at 1321) (citations omitted).

The Prosecution Of The Unfair Labor Practice Case By The Same N.L.R.B. Attorney Who Presided At The Prior § 10(k) Hearing Was Not An Improper Commingling Of Prosecutorial And Decisional Functions.

There remains only the question of whether the A.P.A.'s proscriptions against the commingling of prosecutorial and decisional roles were violated "in spirit" if not in the letter of the statute because the same Board attorney conducted the § 10(k) hearing and subsequently prosecuted the § 8(b)(4)(D) complaint.[12] In this respect, the Seventh Circuit held:

> "In our case the hearing officer had the duty of hearing the evidence in the case, and subsequently urging and relying upon it as prosecutorial evidence.

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[12] We note, in passing, that if there was a violation of the A.P.A., such spiritual violation was so ethereal as to escape the notice of Local 134 until it filed its brief to the administrative law judge, long after the Board's § 10(k) determination, and even after the close of the unfair labor practice hearing.

> We think that the knowledge on the part of the presiding officer that he will subsequently advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing. This commingling of functions is plainly inconsistent with both the spirit and the letter of the Act, and, we think, incompatible with the accepted norms for proper administration of justice." (A. 70-71).

This holding of the Seventh Circuit is premised upon several factual errors. First, the hearing officer did not play a judicial or decisional role in the § 10(k) hearing, but rather acted as an administrative fact gatherer. He shares no decisional authority with the Board but merely "prepares an analysis of the issues and the evidence" and "makes no recommendations in regard to resolution of the dispute" (29 CFR § 101.34). In *International Longshoremen's and Warehousemen's Union, supra*, at 629, the Board described the hearing officer's role as follows:

> "The primary function of the hearing officer, who is acting under delegation of authority from the Board, in a nonadversary proceeding is to insure that the record contains a full statement of pertinent facts as may be necessary for the determination of the dispute by the Board."

Secondly, the hearing officer had no knowledge that there would be a subsequent unfair labor practice proceeding. Certainly, he could not have foreseen that he would prosecute it. In fact, the Board does not ordinarily assign the same person to conduct related § 10(k) hearings and § 8(b)(4)(D) unfair labor practice cases.

The most fundamental error in the Seventh Circuit's holding is the Court's apparent concept that the hearing officer is engaged in mixed functional roles at the § 10(k) hearing itself, i.e. that he is hearing the evidence

and at the same time using that opportunity to get a running start on his prosecutorial tasks. This being the case, the Court has reasoned, the evil is within the purview of the statement of the Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service, 77 (Mimeo. 1940) quoted in part in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 44 (1950) and also set out in the Seventh Circuit's decision (A. 69-70) as follows:

> "A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible. Nor is complete divorce between investigation and hearing possible so long as the presiding inspector has the duty himself of assembling and presenting the results of the investigation. . . ."[13]

Wong Yang Sung concerned deportation proceedings (clearly an accusatorial proceeding) conducted by the Immigration Service wherein the responsibility of the "presiding inspector" was notably prosecutorial because he had the duty to conduct the interrogation of the alien, to cross examine the alien's witnesses, and to "present such evidence as is necessary to support the charges in the warrant of arrest" (339 U.S. at 46).

We submit that the hearing officer's role in a § 10(k) hearing is completely dissimilar to that of a presiding inspector of the Immigration Service which was decried by this Court in *Wong Yang Sung* as being violative of the A.P.A. proscription against commingling. As noted previously, the § 10(k) hearing is not accusatory, and furthermore, the hearing officer is neither required nor allowed to build a case for or against either

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[13] The Seventh Circuit erroneously attributed this statement to Mr. Justice Jackson. (A. 69).

union claiming entitlement to the work in question. As this Court noted in *Plasterers'*, *supra*, note 7, the hearing is "a comparative proceeding aimed at determining which union is entitled to perform certain tasks." The hearing officer has no functional motivation to favor either union in the reception of the evidence and has no "responsibility of appraising the strength of the case" nor "of seeking to make it as strong as possible" (*Wong Yang Sung*, *supra*, at 44).

Quite clearly there was no violation of the A.P.A.'s commingling proscription in fact or spirit in this case. Indeed, Local 134 has not alleged that any facts or findings of the Board, in either the § 10(k) determination, or the unfair labor practice proceeding, demonstrated that it was prejudiced by the hearing officer's functioning as the prosecutor in this case. There is no claim of any actual impropriety or prejudice. As noted previously, Local 134 never even raised an objection.

CONCLUSION

It is respectfully submitted that the Seventh Circuit's decision holding that § 10(k) proceedings are adjudications, within the meaning of § 554 of the A.P.A., constitutes reversible error. Its sole basis for denying enforcement of the Board's Decision and Order was the finding of an improper commingling of prosecutorial and adjudicative functions. As to the merits, the Seventh Circuit found that the Board's determination of dispute and its subsequent unfair labor practice adjudication, were otherwise proper and supported by substantial evidence on the record. We therefore ask that this Court enter an order reversing the decision of the Court of Appeals and enforcing the Decision and Order of the National Labor Relations Board. In the alternative we ask that the decision be reversed as to the administrative law point, and that the case be remanded to the Seventh Circuit with instructions for the entry of an order and decree enforcing the Board's order.

Respectfully submitted,

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APPENDIX

APPENDIX

LABOR MANAGEMENT RELATIONS ACT OF 1947

* * * *

§ 160. Prevention of Unfair Labor Practices

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any

such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged n promotng or protecting the interests of employee members. The serv-

ice of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).